Supreme Court, U.S.
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No. 96-1148

In the Supreme Court of the United States

OCTOBER TERM, 1996

OUTLAWS CLUB, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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32 pp

QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's appeal on the ground that his notice of appeal failed to comply with Federal Rule of Appellate Procedure 3(c) by not specifying the identity of the party taking the appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the judgment is noted at 94 F.3d 643 (Table). The opinion of the district court (App., *infra*, 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1996. A petition for rehearing was denied on October 21, 1996. The petition for a writ of certiorari was filed on January 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial, the United States District Court for the Western District of North Carolina ordered the forfeiture, under 18 U.S.C. 981 and 21 U.S.C. 881(a)(7), of a building to which petitioner Michael Weldon Bazemore had filed a claim asserting an interest. The court of appeals dismissed petitioners' appeal.[1] Pet. App. 1-5.

1. On November 22, 1991, the United States filed an *in rem* forfeiture complaint against a building located at 5420 Howard Street in Charlotte, North Carolina, and occupied by the Outlaws Motorcycle Club. Pet. App. 1. The complaint alleged that the building had been used to facilitate drug trafficking and to launder the proceeds of drug trafficking. App., *infra*, 1a-2a. On March 9, 1992, petitioner, contending that he was a member of the Outlaws Club and was "attorney-in-fact for the record owners of the property," filed a claim asserting an interest in the property on behalf of the club. Neither the Outlaws Club nor any other member of the club filed a claim. Pet. App. 2.

At a bench trial in January 1995, the defendant property, through its attorney, stipulated that the government had shown probable cause to believe that the property had been used in drug trafficking and money laundering violations. App., *infra*, 2a. Witnesses testified that there were three names "on the

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[1] The caption to the petition indicates that petitioners are the forfeited property (Outlaws Club), Michael Weldon Bazemore, and the Charlotte-Mecklenburg County Tax Collector. The body of the petition, however, makes arguments only on behalf of petitioner Michael W. Bazemore. Our references in this brief to petitioner therefore refer to Bazemore.

deed" of the defendant property, none of which was petitioner's name. *Id.* at 4a. Petitioner did not testify. *Id.* at 5a.

After the trial, on January 23, 1995, the district court granted judgment for the United States. The court found "no evidence in the record that [petitioner] was attorney in fact for any of the persons or entities to whom the property had been conveyed by deed, or who had a possessory interest in the property." App., *infra*, 4a. The court noted that there was nothing in the record indicating who are the "record owners" of the property. *Ibid.* None of the persons whose names were "on the deed" had filed a claim or introduced documentary evidence of their ownership, and there was no evidence suggesting that they had authorized petitioner to file a claim on their behalf. *Id.* at 4a-5a. The court observed that petitioner, "through his attorney, merely states that he asserts his right to Defendant in this action and did not allege he was authorized to make the claim, and did not produce any evidence that he was a duly appointed Attorney-in-Fact for the 'record owners.'" *Id.* at 5a.

Based on these findings, the district court held that "[t]he 'Claimant' has not filed a proper claim stating an interest in the property as is required by the applicable law." App., *infra*, 5a. In particular, the court found that petitioner had failed to comply with Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which requires that a claimant "state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action" or, "[i]f the claim is made on behalf of the person entitled to possession by an agent, bailor, or attorney, * * * that [he] is duly authorized

to make the claim." Because petitioner had not filed a proper claim, the court held that he "does not have standing and is not a proper party to this action." *Id.* at 6a.

2. On January 31, 1995, a notice of appeal was filed that stated as follows:

> NOW COMES the Defendant, by and through its attorney, and gives Notice of Appeal to the Fourth Circuit Court of Appeals from the Memorandum of Decision and Order and Judgment entered by The Honorable Robert D. Potter on January 23, 1995.

Pet. App. 3. The notice was signed by the attorney who had represented petitioner in the district court. No other notice of appeal was filed. *Ibid.*

The court of appeals dismissed the case on the ground that the notice of appeal failed to comply with Federal Rule of Appellate Procedure 3(c) by not "specify[ing] the party or parties taking the appeal." Pet. App. 1-5. The court explained that the defendant in an *in rem* proceeding "is merely the real property that is the subject of the action," and the defendant thus has "no legal standing to contest [its] own forfeiture." *Id.* at 3. As a result, the court concluded, "the Defendant"—the party designated in the notice of appeal—could not be the appellant. Moreover, "[t]he notice of appeal nowhere specifies that it is being taken on behalf of [petitioner], and his intent to appeal is not otherwise clear therefrom." *Ibid.* The court noted that, "[a]lthough one might conclude from all the circumstances that [petitioner] intended to appeal (insofar as he was the only party with legal standing to appeal and that a notice of appeal was in fact filed), Rule 3(c) specifically states that a party's intent to appeal must be discernible 'from the notice,'

rather than from the *filing* of the notice." *Id.* at 3-4. The court thus held that it lacked jurisdiction to consider the appeal. *Id.* at 4.

Judge Widener dissented. Pet. App. 4-5. In his view, "the dismissal of the case by the district court and the dismissal of this appeal carry too far a rigid construction of both rules of pleading as well as the Rules of Appellate Procedure." *Id.* at 5.

ARGUMENT

Petitioner does not challenge the basis of the court of appeals' decision—that he failed to file a proper notice of appeal under Federal Rule of Appellate Procedure 3(c). Petitioner instead takes issue with the district court's decision, contending (Pet. 8-13) that the district court erred in finding that he had not filed a legally sufficient claim to the property. Because the court of appeals' reason for dismissing his appeal is sufficient and unchallenged, and because the district court's decision was correct in any event, this Court's review is not warranted.

1. Before December 1, 1993, Federal Rule of Appellate Procedure 3(c) provided that a notice of appeal "shall specify the party or parties taking the appeal," and that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." In *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), this Court held that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Id.* at 314. Moreover, this Court observed, "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not

grant the latter power, we hold that the Rules likewise withhold the former." *Id.* at 315. The Court thus indicated that the specification requirement in Rule 3(c) was a "jurisdictional requirement[]." *Id.* at 317. In *Smith* v. *Barry*, 502 U.S. 244 (1992), this Court reaffirmed that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." *Id.* at 248 (citation omitted).

Effective December 1, 1993, Rule 3(c) was amended to provide in relevant part:

> A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." * * * An appeal will not be dismissed for * * * failure to name a party whose intent to appeal is otherwise clear from the notice.

The amendment sought to liberalize the Rule's requirements with respect to naming the party taking the appeal, particularly in cases involving multiple appellants. Nothing in the amendment, however, affects this Court's conclusion in *Torres* and *Smith* that a complete failure to identify the party taking an appeal is a jurisdictional defect requiring dismissal. See Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge Over Troubled Water—Or*

Just Another Trap?, 157 F.R.D. 587, 594 (1994). As the court of appeals observed in this case, *Torres'* "general declarations respecting the effect of a party's clear failure to comply with the Rule surely remain viable" under the amended rule. Pet. App. 4 n.3.

Petitioner's notice of appeal failed to comply with amended Rule 3(c). First, the notice did not "specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." The caption states only the title of the case, and, because the case is an *in rem* action against the defendant property, the title gives no indication of petitioner's involvement. The body of the notice, meanwhile, simply identifies the party taking the appeal as "the Defendant, by and through its attorney." Pet. App. 3. The defendant property, however, cannot litigate on its own behalf; only a claimant asserting an interest in the property may contest an *in rem* forfeiture complaint. See *United States* v. *One Parcel of Real Property*, 831 F.2d 566, 567-568 (5th Cir. 1987). The notice thus gives no indication that a party asserting a claim to the defendant property intends to appeal, and thus fails to "specify the party or parties taking the appeal." See *Fleming* v. *Asbill*, 42 F.3d 886, 889 n.3 (4th Cir. 1994) ("[E]ven under the recent amendment, an unnamed party's intent to appeal must be clear from the notice itself.").

Nor is this a case in which petitioner's "intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c). To the contrary, as the court of appeals noted (Pet. App. 3 n.2), the notice of appeal states that an appeal is being taken by "the Defendant, by and through *its* attorney," thereby reinforcing the conclusion that the appeal is being filed by the defendant

property, and not by a person asserting a claim to the property. As a result, it is not objectively clear from the notice itself that petitioner intended to appeal the district court's ruling. See *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 570 (7th Cir. 1995); see also Fed. R. App. P. 3 advisory committee's note (1993 Amendment) (observing that it must be "objectively clear that a party intended to appeal").

2. Even if petitioner had properly noticed his appeal, his contention that the district court erred in finding that he did not file a proper claim to the property is without merit. In support of his argument, petitioner observes that the government did not challenge his claim to the property. According to petitioner, because the government did not dispute his status as a claimant, the district court erred in ruling that his claim was insufficient. That contention is erroneous.

Once the government demonstrates probable cause in a forfeiture action, the claimant has the burden to establish that he has standing to challenge the forfeiture, which requires some showing of an ownership interest in the defendant property. See *United States* v. *One 1990 Chevrolet Corvette*, 37 F.3d 421, 422 (8th Cir. 1994); *United States* v. *One Parcel of Real Property*, 942 F.2d 74, 79 (1st Cir. 1991); *United States* v. *One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1374-1375 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987). Here, petitioner simply asserted in his complaint that he was "attorney-in-fact for the record owners of the property" and that he "has a substantial property right in the property seized." App., *infra*, 3a. Petitioner submitted no evidence at trial to substantiate any of those assertions. Petitioner did not testify, and the witnesses who did testify indicated

that there were three names—none of which was petitioner's—"on the deed" to the property. Petitioner never sought to introduce the deed, and he placed no "evidence in the record that any person or any entity executed a power of attorney appointing [petitioner] as attorney-in-fact for anyone, or any entity. A power of attorney was not moved into evidence. There is nothing in the record to indicate who are the 'record owners.'" *Id.* at 4a.

Accordingly, as the district court correctly found, petitioner failed to establish standing to challenge the forfeiture. See *United States* v. *$38,570 U.S. Currency*, 950 F.2d 1108, 1112 (5th Cir. 1992) ("bare assertion of ownership of the *res*, without more, is inadequate to prove an ownership interest sufficient to establish standing"); *Mercado* v. *United States Customs Service*, 873 F.2d 641, 644-645 (2d Cir. 1989) ("naked claim" of possessory interest is insufficient to establish standing; "some indicia of reliability or substance" needed "to reduce the likelihood of a false or frivolous claim"); see also *Baker* v. *United States*, 722 F.2d 517, 518 (9th Cir. 1983) ("The plaintiffs are not 'claimants' because they have alleged no specific property interest in the forfeited items."). Petitioner does not challenge the district court's findings in this regard. He instead argues that the government did not challenge his assertion of an interest in the property, and that his failure to comply with the applicable rules should therefore be excused. But the fact that the government did not contest petitioner's standing to challenge the forfeiture or the validity of

his claim does not excuse petitioner's failure to carry his burden of showing an interest in the property.[2]

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[2] Petitioner's assertion that the court of appeals' decision conflicts with the decisions of other courts of appeals is without merit. Petitioner cites no case that addresses the ground on which the court of appeals dismissed his appeal—*i.e.*, the failure to file a notice of appeal in compliance with Federal Rule of Appellate Procedure 3(c). The cases on which petitioner relies deal with Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which sets out the procedure to be followed by claimants to property subject to forfeiture. Those cases stand for the proposition that failure to comply with Rule C(6) may be excused if the circumstances show that the claimant can fulfill the Rule's requirements. See *United States* v. *$191,910 in U.S. Currency*, 16 F.3d 1051, 1058 (9th Cir. 1994) (claim is sufficient when claimant made "repeated, colorable" assertion of interest and *res* was found in claimant's possession); *United States* v. *$38,570 U.S. Currency*, 950 F.2d at 1113 ("government admitted, and the district court explicitly found, facts" showing claimant's interest in *res*); *United States* v. *Currency $267,961.07*, 916 F.2d 1104, 1108 (6th Cir. 1990) (remanding to allow district court to exercise discretion to allow complaint to be amended to comply with Rule); *United States* v. *One Urban Lot Located at 1 Street A-1*, 885 F.2d 994, 1000-1002 (1st Cir. 1989) (finding that verified answer served as verified claim required by Rule); *United States* v. *U.S. Currency, in the amount of $103,387.27*, 863 F.2d 555, 561-563 (7th Cir. 1988) (remanding to allow district court to consider whether claimants should be given an extension of time to file a properly verified claim); *United States* v. *1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435-1437 (9th Cir. 1985) (same). None of those cases allows a claimant to pursue a claim where he has completely failed to prove an interest in the property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

MARCH 1997

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. C-C-91-408-P

UNITED STATES OF AMERICA

v.

OUTLAWS CLUB, LOCATED AT 5420
HOWARD STREET, CHARLOTTE, N.C.,
MORE PARTICULARLY DESCRIBED IN A
DEED RECORDED AT BOOK 4407, PAGE 460,
MECKLENBURG COUNTY REGISTRY, DEFENDANT

MEMORANDUM OF DECISION AND ORDER

[Filed: Jan. 23, 1995]

THIS MATTER is before the Court on a Complaint for Forfeiture *In Rem*, filed November 22, 1991, pursuant to the provisions of 18 U.S.C. § 981 and 21 U.S.C. § 881, of the Outlaws Clubhouse at 5420 Howard Street, Charlotte, North Carolina, as more particularly described in Deed Book 4407, page 460 of the Mecklenburg County Public Registry.

The Plaintiff alleges that there is probable cause to believe that the Defendant property has facilitated

drug trafficking and the laundering of proceeds of that trafficking by the Outlaws Club.

A hearing was held on January 11, 1995, at which the Defendant, through its attorney, stipulated that there was probable cause for the forfeiture alleged by Plaintiff.

The complaint further alleges all right, title and interest in the Defendant property vested in the United States at the time of the commission of the unlawful act giving rise to the forfeiture and has become and is forfeitable to the United States of America.

The Complaint further alleges upon information and belief that Nancy P. Winecoff and the Outlaws may have or claim an interest in the property.

FINDINGS OF FACT

1. Defendant "The Outlaws" was served by the U.S. Marshal on February 4, 1992, by posting papers on the front door of the clubhouse.
2. Michael Bazemore, David Lowery, and Edward Shalkowski were all served personally by the U.S. Marshal on February 4, 1992.
3. The Defendant, Outlaws Club, filed a purported "claim" on March 9, 1992, and an answer on April 16, 1992. The Claim and the answer were signed by Harold Bender, Attorney at Law for Claimant, and verified by Michael Weldon Bazemore.
4. Michael Bazemore does not purport to make any claim except that he is "Attorney in Fact" for the record owners of the property and has a substantial property right in the property seized.

5. The only claim filed was that of Michael Weldon Bazemore whose claim is as follows:

> **NOW COMES** Michael Weldon Bazemore, by and through his attorney, and files this Claim to assert an interest in the property which is the subject matter of this action. By virtue of this Claim, he demands its restitution and asserts his right to defend this action. The Claimant is a member of the Outlaws Club, an unincorporated association and is attorney-in-fact for the record owners of the property and has a substantial property right in the property seized. The Claimant asserts that the property was not used to facilitate drug transactions nor was it involved in any money laundering activity.
>
> **WHEREFORE**, Michael W. Bazemore, attorney-in-fact, asserts his claim against the property which is the subject matter of this action, demands its restitution and asserts his right to defend this action.

The claim was signed by Harold J. Bender, Attorney at Law.

The "claim" contained the following verification:

> **STATE OF NORTH CAROLINA**
>
> **VERIFICATION**
>
> **COUNTY OF MECKLENBURG**
>
> **MICHAEL W. BAZEMORE**, being first duly sworn, deposes and says that his [sic] is Attorney-in-Fact and the Claimant in the foregoing action, that he has read the foregoing Claim and know [sic] the contents thereof and

the same is true of his own knowledge, except as to those matters and things alleged on information and belief, and as to those, he believes them to be true.

THIS the 3rd day of March, 1992.

/s/ MICHAEL W. BAZEMORE

(NOTARY SIGNATURE & SEAL)

6. There is no evidence in the record that Bazemore was attorney in fact for any of the persons or entities to whom the property has been conveyed by deed, or who had a possessory interest in the property.
7. Shalkowski and Arnold testified that three names "were on the deed," as well as that of Bill Broadway, who is now deceased. None of the three persons whose names, according to the testimony of Shalkowski and Arnold, were "on the deed" filed a claim.
8. There was not any deed or certified copy of deed moved into evidence to indicate who were in fact the grantees in a deed. There is no evidence in the record that any person or any entity executed a power of attorney appointing Bazemore as attorney-in-fact for anyone, or any entity. A power of attorney was not moved into evidence. There is nothing in the record to indicate who are the "record owners." The "claim" does not state for whom Bazemore purported to be attorney-in-fact (except "record owners").

9. There is no statement in the claim that Bazemore was duly authorized to make the "claim."
10. Bazemore, through his attorney, merely states that he asserts his right to Defendant in this action and did not allege he was authorized to make the claim, and did not produce any evidence that he was a duly appointed Attorney-in-Fact for the "record owners." Bazemore did not testify.

CONCLUSIONS OF LAW

The "Claimant" has not filed a proper claim stating an interest in the property as is required by the applicable law. The provisions of 21 U.S.C. § 881(b) and (d) require application of the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules) and the procedures for enforcement of customs claims to such forfeitures. *See, e.g.*, 19 U.S.C. §§ 1608, 1615. Any person seeking to participate in the forfeiture action must first file a claim stating his interest in the property, pursuant to 19 U.S.C. § 1608 and the supplemental rules for certain Admiralty and Maritime claims, Rule C(6). 19 U.S.C. § 1608 requires the filing of a claim within twenty days from the date of the first publication of the notice of seizure (in the captioned cause, the filing of the complaint).

Supplemental Rule C(6) requires, in pertinent part:

> The claim shall be verified on oath or solemn affirmation; and shall state the interest in the property by virtue of which the Claimant demands its restitution and the right to defend the action. If a claim is made on behalf of the person entitled to possession by an agent, bailor,

> or attorney, it shall state that he is duly authorized to make the claim.

A claimant has the burden of proof to prove (1) standing by timely filing of a sworn claim and answer in compliance with Supplemental Rule C(6) providing evidence of the nature of his or her legitimate ownership or possessory interest in the Defendant property, *and* (2) either (a) prove that Defendant property has not been involved in, or used or intended to be used to facilitate any violation of the laws specified in the Complaint and that it does not constitute the proceeds of violations of those laws, or (b) prove that the violations or unlawful use occurred without either the knowledge or consent of the owner and that the owner did everything that reasonably could be expected to prevent the activity.

The claimant has the burden of proof by a preponderance of the evidence on all issues pursuant to 18 U.S.C. § 981(d), 21 U.S.C. § 881(d), and 19 U.S.C. § 1615. The property will be forfeited if affirmative, admissible evidence is not produced which meets this burden.

To summarize, this Claimant (whoever or whatever the claimant is in this case) has not filed a claim as required by the statutes and, therefore, does not have standing and is not a proper party to this action. Nor has the "Claimant" Bazemore produced any evidence that he holds a power of attorney from any party having an interest in the property. N.C. Gen. Statutes. §§ 32A-1; 32A-2; 32A-8; 47-28; 47-43; and 47-43.2.

To have standing to contest a forfeiture, one must be a "Claimant." *United States v. Fifteen Thou-*

sand Five Hundred Dollars ($15,500.00) in U.S. Currency, 558 F.2d 1359, 1360 (9th Cir. 1977).

Neither Shalkowski, Lowery, nor Arnold, who testified, filed a claim at any time.

Since the filing of a claim is a jurisdictional prerequisite not only to the Claimant being allowed to participate in the forfeiture action, but also to his being allowed to contest probable cause for the seizure and, if necessary, to assert his/their claim, it is clear that the "Claimant" in this case is not a proper party to this litigation.

Not having any standing, the "Claimant" cannot satisfy his burden of proof to demonstrate by a preponderance of the evidence a lack of knowledge or consent to drug related activities.

The real property described in Deed Book 4407, page 460 of the Mecklenburg County Public Registry, will be forfeited to the United States.

A Judgment will be filed simultaneously with this Memorandum of Decision and Order.

The Clerk is directed to certify copies of this Order to defense counsel and the United States Attorney.

This the 20th day of January, 1995.

/s/ ROBERT D. POTTER
ROBERT D. POTTER
Senior United States
District Judge